

ULP Matter # 4

Board Meeting Date: 6-30-22

INVESTIGATOR'S MEMORANDUM

TO: THE HONORABLE STATE EMPLOYMENT RELATIONS BOARD
FROM: Judy Knapp, Labor Relations Specialist
DATE: June 1, 2022
RE: 2022-ULP-04-0045, Bryan J. Pesta v. American Association of University Professors - Cleveland State University Chapter

PARTIES

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SUMMARY OF CHARGE

On April 26, 2022, Bryan J. Pesta (Mr. Pesta/Charging Party) filed an unfair labor practice charge against the American Association of University Professors - Cleveland State University Chapter (Union/AAUP/Charged Party). Mr. Pesta alleges the Union violated Ohio Revised Code § 4117.11 (B)(6) by failing to properly represent him during the internal investigation process and declining to take his grievance to arbitration.



FINDINGS UPON INVESTIGATION

1. The Union is the Board-certified bargaining representative for the employees identified in Article 1 per the agreement with the Cleveland State University (University). The parties' collective bargaining agreement is effective from August 16, 2021 through August 15, 2024. The grievance process results in final and binding arbitration.
2. By way of background, Mr. Pesta was a full Professor at the time the University began an internal investigation regarding his alleged "academic research misconduct" as a result of his misuse of controlled data from the database of the National Institute of Health (NIH) and for engaging in unethical research practices, which included misrepresentation of the intended use of the data sets. After a nine-month investigation, the formal internal investigation ended in July of 2021.
3. On July 11, 2021, Mr. Pesta filed an appeal of the NIH's findings, which was denied by the NIH on August 17, 2021. (Denial is Exhibit 5 in the Charged Party's position statement).
4. Mr. Pesta alleges that during the investigation, the Union never met with him to discuss the case. Mr. Pesta confirms that he did receive emails from the Union during this period. In an August 23, 2021 email from Mr. Pesta to the Union's Grievance Officer, Birch Browning (Grievance Officer Browning), Mr. Pesta thanks the Union for its willingness to help. The email also advises the Union that he [Mr. Pesta] had obtained an outside counsel, Jay Carson (Mr. Carson), to defend him against the University's charges.
5. The Union asserts that Mr. Pesta never notified it of the investigation; nor did he request any representation during the investigation. The Union states that, by his own admission, Mr. Pesta did not notify the Union of the investigation until August 23, 2021. The Union confirms that in his August 23, 2021 email, Mr. Pesta "suggested" a meeting, but also confirms that there were "many" back and forth emails between Mr. Pesta and the Union, which "negated" the need for a meeting. (Affidavit of current-Union President Linda Quinn is Exhibit 7 in the Charged Party's position statement).
6. On the same day, Grievance Officer Browning responded: "As I understand it, the union is usually hesitant to be involved once outside counsel has been retained. That being said, the union does have an interest in making sure that the CBA is properly followed. Note that these are my personal understandings and do not necessarily represent the position of the union. I'll consult with the officers of the CSU-AAUP [Union] to make sure I'm on strong footing here. We will, of course, do everything we can within our constraints and mandates."
7. The then-Union President Don Allensworth-Davies (President Allensworth-Davies) sent an email to Mr. Pesta: "It would be helpful to know exactly what you are seeking from the union so we can present this to the [Union's] Executive Committee. Our highest grievance level is when we typically bring in legal

representation; everything before that is an effort to reach a resolution before escalating to legal action. Given that you have retained [outside] counsel, what are you expecting from the union that would be different than what your attorney can already provide”?

8. Mr. Pesta responded: “Thank you for the prompt reply. I would argue that [the University] is violating (or will be) the CBA’s just cause clause. Also, I would like to exercise my *Weingarten v. NLRB* rights for any [University] interactions going forward. But thank you for further looking into this.”
9. Mr. Pesta’s counsel, Mr. Carson, sent an email to President Allensworth-Davies providing: “I’m Dr. Pesta’s counsel – I encouraged him to contact the Union to make sure that he was aware of all of his rights under the CBA, that the Union was aware of his current situation, and that everyone was on the same page. My representation of Dr. Pesta has been focused on defending and responding to charges from the NIH and assisting Dr. Pesta in presenting his case in the current investigation. My sense is that if there are any CBA grievance issues that come out of this investigation or action taken against him, that would be more in the Union’s wheelhouse than mine...”
10. On August 30, 2021, Grievance Officer Browning sent an email to Mr. Pesta providing, in part: “I consulted with the Executive Committee regarding your request for union representation during the NIH investigation. The union’s interest in this and every case is to ensure that the...(CBA); along with any policies that are derived from the CBA, are followed scrupulously. The [Union] has no specific role in the NIH investigation process. But, as a member of the bargaining unit, you have the right to request union representation in an inquiry or meeting that may result in discipline or sanction that occurs within the investigation process. If you request representation at a meeting, I will accompany you or attend virtually provided the meeting does not conflict with my teaching responsibilities. In the event that the deciding officer in this case recommends sanction, the union will vigorously defend the policies and procedures, including the ‘just cause’ clause. The Executive Committee, may, at its own discretion, file a grievance in response to evidence of a possible violation of the CBA.”
11. Mr. Pesta alleges that the Union did not vigorously defend him and, despite numerous requests, did not give him “simple feedback” regarding whether it [Union] thought the University violated the “just cause” clause of the CBA.
12. On September 2, 2021, the Investigation Committee sent an email to Mr. Pesta and his outside counsel advising him that the committee would like to schedule an initial interview with him. The committee stated that Mr. Pesta would be allowed to have the assistance of counsel or “another advisor” during the interview and that the meeting would be recorded, and the transcript would be available for his review and correction. The Union asserts that it was not copied on the Investigation Committee’s email. (Exhibit 12 in the Charged Party’s position statement).

13. On September 7, 2021, Mr. Pesta had his first interview with the internal investigation committee. Mr. Pesta states that the Union was not present despite his August 23, 2021 email that he would like to exercise his *Weingarten* rights for any University interactions. It must be noted that the August 23, 2021 email does make a specific request for Union representation and Mr. Pesta did not provide any information that he requested Union representation in response to Grievance Officer Browning's August 30, 2021 email to be notified of any meeting and he would be present.
14. On September 9, 2021, the Union states that Grievance Officer Browning sent an email to Mr. Pesta asking if the interview had occurred and if so, how it went. Mr. Pesta responded that he thought the meeting had gone well and had asked for the meeting link and that he would forward it to Grievance Officer Browning. The Union states that Mr. Pesta "omitted" this correspondence in the instant charge. (Email is Exhibit 14 in the Charged Party's position statement).
15. Mr. Pesta, on September 12, 2021, sent Grievance Officer Browning a link to a video of his first internal investigation. The email states: "Please let me know your thoughts." Mr. Pesta contends that this was his first "formal request" for the Union's feedback regarding the merits of his case.
16. The Union asserts that it was only after the September 7, 2021 interview had occurred did Mr. Pesta inform the Union. The Union states that Mr. Pesta did not formally invite the Union to the September 7, 2021 interview nor did he share any of the underlying documents surrounding the investigation. The Union maintains that Mr. Pesta is "leaving out pertinent facts" in the instant charge when he "accuses" the Union of not attending the September 7, 2021 interview.
17. On September 15, 2021, Grievance Officer Browning responded to the September 12, 2021 email providing: "I've reviewed the video, and I don't see any contractual, policy, or procedural concerns." Mr. Pesta alleges that this was the Union's "sole feedback" for him about his case. On September 16, 2021, Mr. Pesta responded: "Thank you Birch. What about the just cause clause?"
18. The Union asserts that after reviewing the transcript, it found that the first sentence of Mr. Pesta's statement to the committee provides: "I want to apologize for the trouble I got CSU [University] into with the NIH."
19. Grievance Officer Browning responded: "As I read it, 'just cause' has to do with any sanctions, as in, the sanction matches the determined offense. I've cc'd others who may have a different understanding of the contract. If I recall correctly from my reading of the policy, there may eventually be a committee that decides if you've committed academic misconduct. I also think I recall that the Provost then decides the sanctions, if any, if found guilty. That's the point where 'just cause' comes into play. Remember, the union's role here is not to make a determination, but to make sure the contract is followed both in letter and spirit."
20. On the same day, President Allensworth-Davies also responds to Mr. Pesta stating: "Birch's assessment is correct. If the administration decides to pursue

sanction or dismissal, then the contract requires a committee of equal representation between administration and faculty union members to determine if just cause is present for the proposed action.” Mr. Pesta alleges that if a management committee is “deciding his guilt, shouldn’t the Union have done some type of its own investigation?”

21. On October 11, 2021, the Union states that Mr. Pesta was interviewed a second time by the Investigation Committee. The Union maintains that again, Mr. Pesta did not notify it of this second interview, did not invite the Union to attend and did not invite the Union to review the transcript.
22. The Union states that after the interviews, the Investigation Committee provided a draft of its report to Mr. Pesta and gave him the opportunity to submit a rebuttal. On December 2, 2021, Mr. Pesta provided a rebuttal and on December 3, 2021 provided a “revised” rebuttal. The Union asserts that Mr. Pesta did not have any communication with the Union related to the drafting or submission of his rebuttal, nor did he, at the time, provide a copy of draft to the Union.
23. On December 6, 2021, Mr. Pesta sent Grievance Officer Browning an email stating: “Birch, thanks for contacting me [for an update]. Yes, the faculty committee just ‘convicted’ me of four ‘serious instances of academic misconduct’. I wrote a rebuttal, they get to rebut this, and then it goes to the Provost for discipline. I swear I’ve done **absolutely** nothing the committee has convicted me of.”
24. Grievance Officer Browning responded: “I’m sorry to hear this. If you want to and you’re comfortable, you can share the documents with me. The key factor here is that any discipline must be progressive and corrective rather than punitive. Please let me know how I can help”. Mr. Pesta alleges that the Union should have filed a grievance at this point given that he faced “the most severe discipline possible termination”.
25. The Investigation Committee issued its Final Report on January 13, 2022 and found that Mr. Pesta had “by clear and convincing evidence” committed serious academic research misconduct in four distinct areas. (Report is Exhibit 5 in the Charged Party’s position statement).
26. On the same day, the Union states that the Provost recommended that Mr. Pesta be terminated. The Provost copied the Union on the 8-page detailed recommendation. (Exhibit 15 in the Charged Party’s position statement).
27. On January 14, 2022, the Union states that the Vice-Provost contacted Mr. Pesta regarding the Ad Hoc committee, to which Mr. Pesta asked if the Provost could explain the process the Ad Hoc committee would be following. The Provost copied Grievance Officer Browning on the email exchange. (Exhibit 16 in the Charged Party’s position statement).
28. The Union asserts that following the January 14, 2022 email exchange, Mr. Pesta asked the Provost if he could have his personal, outside counsel present

at the meeting, but was advised that, pursuant to the CBA, it only allowed him to have his Union representative present. Mr. Pesta responded: "no problem on the lawyer issue" and that he had "personal reasons" for requesting a Zoom meeting. (Exhibit 17 in the Charged Party's position statement).

29. On January 20, 2022, Mr. Pesta sent Grievance Officer Browning an email stating: "Just curious whether you or the [Union] have any thoughts on my case given the documents are out?" Grievance Officer Browning responded: "I've read the documents but, given that there are 170 pages, I did not study them. I'll remind you though, that the union's interest is only to make sure that the process carefully follows the provisions in the contract and the personnel policies. The only opinions that matter at this point are the members of the ad hoc committee. I will be at the meeting next Friday morning to observe. If I think they are deviating from procedure, I will be sure to speak up. If you have questions during the meeting regarding procedure, you should feel free to ask me."
30. Mr. Pesta alleges that the Union "seems" to argue that only management's position is relevant when justifying employee disciplinary actions, which "ignores" the employee's rights under the just cause clause. Mr. Pesta confirms that this is a "complex case full of technical jargon", but a "quick read" by just one member of the Union's Executive Committee "does not constitute fair representation."
31. Mr. Pesta responded to Grievance Officer Browning's January 20, 2022 email stating: "I was wondering specifically about the [Union's] opinion on whether the 'just cause' clause will be violated here once I am fired". Grievance Officer Browning responded: "First, I am sorry that you are in this situation...I do understand your question regarding just cause. I am not in a position to make a judgement, that's initially the role of the ad hoc committee. And ultimately the role of the union also. After the Provost responds to the [ad hoc] committee, I will share the basic findings and the Provost's response with the executive committee, who are the only ones who can file a Level 4 grievance directly to the Provost. See Sections 8.4 and 9.16 in the contract. (As a grievance officer, I'm a member of the Executive Committee but I do not have a vote). I am reviewing the contract clauses and the policy documents and will be at the meeting to make sure the committee and the administration follow them".
32. The Union asserts that on January 25, 2022, Mr. Pesta submitted a 19-page reply to each member of the Ad Hoc Committee regarding the Provost's Decision Letter. (Exhibit 19 in the Charged Party's position statement).
33. The Ad Hoc Committee met on January 28, 2022 where Grievance Officer Browning represented Mr. Pesta. The Union states that Mr. Pesta provided a Power Point to everyone in attendance, but that it did not rebut the charges but "simply said that he did not mean to do what he was accused of doing and that he was sorry." (Exhibit 20 in the Charged Party's position statement).
34. On February 7, 2022, Mr. Pesta emails Grievance Officer Browning stating: "Thank you for participating in the meeting on 1/28, and sorry for the delay in reaching out. I didn't really see any procedural issues for that meeting, so I am

wondering what the [Union's] take is here." Grievance Officer Browning responded: "I don't see any procedural issues, either. When you get a response from the ad hoc committee and then the Provost, you can decide if you want to share it with the Executive Committee. If they think any part of the response is grievable, they can vote to file one."

35. On February 9, 2022, the Union states that Grievance Officer Browning updated the Executive Committee but did not identify Mr. Pesta by name. On February 14, 2022, Mr. Pesta send an additional document to the Ad Hoc Committee entitled *Final Considerations*. (Exhibit 22 in the Charged Party's position statement).
36. The University notified Mr. Pesta on February 28, 2022 that by a unanimous decision of the Ad Hoc Committee, he had been terminated effective as of March 4, 2022. The Union states that on the same day, Mr. Pesta forwarded his termination letter to Grievance Officer Browning asking if the Union would handle his grievance. Grievance Officer Browning asked if materials could be forwarded to the Executive Committee and Mr. Pesta consented. (Exhibit 25 in the Charged Party's position statement).
37. On March 2, 2022, Mr. Pesta sent an email to Grievance Officer Browning stating: "I am trying to figure out what my next step is here. My situation is also time sensitive, as my understanding is I will not be paid throughout the appeals process (i.e., whether the appeal is a [Union] grievance or something else. Could you kindly answer the following questions as soon as you possibly can?" Mr. Pesta asked the following questions: "1. Does the [Union] think I have a case? You may be straight shooters here. [Ad hoc] Committee members have overwhelmingly rejected my argument (though I believe they didn't understand the issues, nor did the Provost), so I guess it's likely you might too...; 2. Will [the Union] filed for (expedited) arbitration?"
38. The Union asserts that following the February 28 and March 2, 2022 emails from Mr. Pesta, Grievance Officer Browning and President Allensworth-Davies discussed the case "in depth" with the Executive Committee. The Union states the decision was made that the Union would not prevail in arbitration given the unanimous finding of the Ad Hoc Committee and that Mr. Pesta's defenses were "simply that everyone along the lines misunderstood the situation" and given his failure to successfully rebut the charges against him, the seriousness of the charges and the "overwhelming evidence" against him, the Executive Committee determined that, based on the merits, it would not be successful in arbitration. The Union maintains that it provided Mr. Pesta with "every protection in the CBA."
39. Grievance Officer Browning responded on March 4, 2022 providing: "Don [Union President] and I have carefully reviewed the entirety of the process you have endured. Given that the [Union] is not in a position to substitute their judgement for that of various committees nor for the Provost [1], and we do not see a contract process violation [2], we will not file a chapter grievance in this case. And, given that as of today you will no longer be a member of the bargaining unit,

this concludes the union's involvement in the case [3]." Mr. Pesta responded: "Received. Thank you." (Exhibit 27 in the Charged Party's position statement).

40. Mr. Pesta alleges that "essentially what the Union is saying is that because management decided I was guilty, I must be guilty..." Mr. Pesta maintains that, in his opinion, the Administration violated the just cause clause in the contract. Mr. Pesta also alleges that the Union did not respond to his questions about a just cause violation. It must be noted that Mr. Pesta confirmed to the Union in his February 7, 2022 email that he agreed with the Union that there had been no contract or process violations by the Ad hoc Committee.

DISCUSSION

Mr. Pesta alleges the Union violated Ohio Revised Code § 4117.11 (B)(6) by failing to properly represent him during the internal investigation process and declining to take his grievance to arbitration.

In the matter of *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98), SERB modified *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89) to hold that arbitrariness, discrimination and bad faith are distinct components of the same duty and should be reviewed on an equal basis. The definition of "arbitrary" conduct was modified to include a failure to take a basic and required step without justification or viable excuse. SERB also held that a union's failure to state the reasons behind its actions, which was not previously called for may result in an un rebutted presumption of arbitrariness. *In re Ohio Civil Service Employees Assn/AFSCME, Local 11*, SERB 93-019 (12-20-93), *aff'd In re Wheeland v. SERB*, 1994 SERB 4-86 (CP, Franklin, 9-2-94), *aff'd In re Wheeland*, 1995 SERB 4-19 (10th Dist Ct App, Franklin, 6-6-95).

In the case of *In re Williams*, SERB 85-059 (11-7-85), SERB found a union's failure to adopt a grievant's view of contract meaning may or may not constitute a breach of the duty of fair representation. Whether there is a breach is dependent upon the facts. It is impossible to anticipate all the conditions which may constitute a violation of the duty. It is easy to state one condition that is *not*. A disagreement between the grievant and the union does not demonstrate, per se, a violation of the duty. To hold otherwise would equate disagreement with unfairness – an obviously illogical conclusion.

Also, in *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), SERB found public employees have no absolute right under Ohio Revised Code § 4117.11(B)(6) to have their grievances taken to arbitration, nor does the statute prevent the union from settling a grievance in a manner contrary to the precise demands of the grievant.

Information gathered during the investigation reveals that Mr. Pesta did not provide sufficient information or documentation to show how the Union's actions were arbitrary, discriminatory or in bad faith in its representation during his internal investigation. Information provided by Mr. Pesta confirms that, on numerous occasions, the Union advised Mr. Pesta that it would not be involved in how the Ad hoc committee and Provost determined his involvement in academic research misconduct, but it would

make sure that the process followed the contract and the policies and procedures. Mr. Pesta's outside counsel advised the Union that he would be handling the internal investigation process and the Union should handle any grievance. Pursuant to *In re Williams*, SERB 85-059 (11-7-85), "It is impossible to anticipate all the conditions which may constitute a violation of the duty. It is easy to state one condition that is *not*. A disagreement between the grievant and the union does not demonstrate, per se, a violation of the duty. To hold otherwise would equate disagreement with unfairness – an obviously illogical conclusion." Mr. Pesta confirmed to the Union in a February 2022 email that he agreed with the Union that he did not see any "procedural issues" during the investigation or subsequent hearings. Mr. Pesta's allegation that the Union did not take his grievance to arbitration is flawed because the Union advised him that it would only file a grievance if the University's process violated the contract. The Union advised Mr. Pesta that it would not be filing a grievance and therefore, the Union did not have any grievance to advance to arbitration. Even if a grievance had been filed, pursuant to *In re AFSCME, Local 2312*, SERB 89-029 (10-16-89), a grievant has no absolute right to have the grievance advanced to arbitration. Based on the totality of the circumstances, the Union's actions do not rise to the level of a (B)(6) violation of the statute.

RECOMMENDATION

That the Board dismiss the charge with prejudice for lack of probable cause to believe that an unfair labor practice has been committed by Charged Party.